In the Supreme Court of the United States.

OCTOBER TERM, 1880.

WALKER'S EXECUTORS
v.
THE UNITED STATES. } No. 193.

APPEAL FROM COURT OF CLAIMS.

DEFENDANTS' BRIEF.

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FACTS.

Prior to 1865, John Scott, produce-loan agent of the Confederate States, among other purchases, bought for his principal, in lots, at different times and of several planters in Alabama and Mississippi, 3,405 bales of cotton, taking a receipt and agreement from each planter, with an official certificate subjoined, which first recited the sale of so many bales, the receipt of their value in Confederate bonds, the engagement of the vendor to take due care of the cotton while on his plantation, and to deliver the same at his own expense at a designated point to the order of the (Confederate) secretary of the treasury, his agents, or assigns; then, below the ven-

dor's signature, was the certificate of an agent of the Confederate Government, certifying to an examination of the cotton, its quality, weight, marks, and condition, "marked with the name of the planter, and on one end the initials C. S. A.," that it was safely stored under cover, and the agreed price the present fair market value. Thirty-seven such receipts and certificates were executed with relation to the 3,405 bales in question. (Record, 9, 10; finding I.)

II. The Confederate Government being in pressing need of raising large sums of money for the military department, and to pay debts incurred and incurring, authorized and directed said Scott to sell said cotton and other cotton purchased by him in like manner. On the sixth day of April, 1865, said Scott, in pursuance of said direction, at Mobile, Ala., where he resided and had his place of business, sold to one O'Grady, also a citizen and resident of Mobile, all of said cotton at $1 a pound in Confederate money, and transferred to him the aforesaid thirty-seven planters' certificates, with his own certificate attached, in the form following:

"CONFEDERATE STATES OF AMERICA,
"TREASURY DEPARTMENT,
"*April* 6, 1865.

"This is to certify that the within and above-described cotton has been sold to D. O'Grady, —— bales, and delivery is hereby ordered to be made to him, or his order, with license to export the same from the Confederate States to any neutral port, on complying with the requisitions of the law.

"Given under my hand and the seal of the Treasury Department, on the year and day above mentioned.

"JOHN SCOTT,
"*Chief Ag't Produce Loan for Ala. & East Miss.*"

III. On the 6th of March, 1865, the President gave to Samuel P. Walker, a citizen and resident of Memphis, Tenn. (whose executors are claimants in this case), an order, of which the following is a copy:

"EXECUTIVE MANSION,
"*March 6th*, 1865.

"Whereas Samuel P. Walker, of Memphis, Tenn., claims to own products of the insurrectionary States, near Grenada and Canton, Miss., and Montgomery and Selma, Alabama, and has arrangements with parties in the same vicinities for other products of the insurrectionary States, all which he proposes to sell and deliver to agents authorized to purchase for the United States the products of the insurrectionary States, under the act of Congress of July 2nd, 1864, and the regulations of the Secretary of the Treasury, it is ordered that all such products which a purchasing-agent of the government has agreed to purchase, and the said Walker has stipulated to deliver, as shown by the certificate of the purchasing-agent, authorized by Regulations VIII, Form No. 1, appended to regulations attached hereto by such agent, and being transported, or in store awaiting transportation, for fulfillment of stipulations and in pursuance of the regulations of the Secretary of the Treasury, shall be free from seizure, detention, or forfeiture to the United States; and officers of the Army and Navy and civil officers of the government will observe this order, and will give the said Walker, his agents, and means of transportation, and said products, free and unmolested passage through the lines (other than blockade lines), and safe conduct within the lines while going for or returning with said products, or while said products are in store awaiting transportation for the purposes aforesaid.

"ABRAHAM LINCOLN."

IV. On the 12th of April, 1865, at said Mobile, said Walker purchased of said O'Grady said 3,405 bales of

cotton, and took from him a bill of sale of the same, of which the following is a copy (omitting date and O'Grady's signature) attached to a list specifying the number of bales, weight, and the names of the counties where originally purchased from the planters:

"For value received of Sam'l P. Walker, I hereby transfer, sell, and assign the above lots of cotton, amounting to 3,405 bales, without recourse upon me, & the holders thereof will please deliver the same to the said Walker or his authorized agent."

At the same time O'Grady indorsed and delivered the thirty-seven planters' certificates, and the transfers of the same, hereinbefore set forth.

V. On the first of June, 1865, at Mobile, Ala., F. W. Kellogg, U. S. agent for the purchase of cotton in the insurrectionary States, gave Walker a written memorandum to the effect that he (K.) had agreed to purchase of Mr. Walker 3,500 bales of cotton, represented as stored or to be stored in certain specified interior counties of Alabama and Mississippi, which cotton, it was recited, Walker stipulates to deliver to Kellogg unless prevented by the authorities of the United States. This memorandum then concludes: "I therefore request safe conduct for the said Samuel P. Walker and his means of transportation, and said cotton, from where it is stored to Mobile, where the cotton so transported is to be sold and delivered to me, under the stipulation referred to above, and pursuant to regulations prescribed by the Secretary of the Treasury."

VI. Between June 30 and December 1, 1865, nineteen hundred and twenty-two $\frac{3}{4}$ bales of this cotton were seized upon the Mississippi plantations, where they had

continued to remain, by Treasury agents appointed by the Secretary of the Treasury to collect cotton which had been sold to the Confederacy, and were sent to New York, sold, and the net proceeds covered into the United States Treasury." (Record, 10 to 12.)

At claimants' request, these additional facts were found:

VII. The city of Mobile, Ala., and also the city of Memphis, Tenn., were in the military occupation of the United States on the 12th day of April, 1865, and remained so until the close of the war.

VIII. The counties in Mississippi, where the cotton in question was stored, and where it was subsequently seized by the United States Treasury agents, were not in the military occupancy of the United States April 12, 1865, but were held and occupied by the so-called Confederates.

IX. Mobile was invested by the Federal gunboats continuously from 1862 up to its capture on the twelfth day of April, 1865.

X. The negotiations for the sale of this cotton by Scott to O'Grady took place in the early part of the year 1865, and the final conveyance delayed until April 6, 1865, and finally completed on that day, by reason of the ill health of Scott, *and for other reasons.*

XI. It was the custom in making sales of cotton in that section of the country (Alabama and Mississippi), as this cotton was, to transfer the planters' certificates as if negotiable, and this was the usual and generally the only mode of delivery made or required.

XII. On the 5th of May, 1865, by the surrender of General Taylor, commanding the Confederate forces in Alabama and Mississippi, the counties in which this

cotton was located passed under the military control of Gen. E. R. S. Canby, commanding the United States forces at Mobile, and the United States military authorities seized all the lines of railway and steamboats in that section, and on the 10th of May, 1865, General Canby issued Order No. 39, of which the following is a copy, omitting date and signature:

"The cotton belonging to the Confederate Government in East Louisiana, Mississippi, Alabama, and West Florida having been surrendered to the Government of the United States, its sale to private individuals, or its transfer to any persons, except the officers or agent of that government, is prohibited. This order applies to all cotton procured by subscriptions to the cotton loan, by the sale of Confederate bonds or notes, by the tax in kind, or by any other process by which the title was vested in the Confederate Government, whether in the possession of the agents of that government or still in the hands of the producers; and all persons in whose charge it may be will be held accountable for its delivery to the agents of the United States. Commanders of districts will be furnished with a transcript from the records of the cotton-agents, showing the quantity and location of the cotton within the limits of their commands, and will give the agents of the Treasury Department, appointed to receive it, such facilities as may be necessary to enable him to secure it.

"Any sales of this property in violation of this order will be treated as the embezzlement of public property.

"By order of Major-General E. R. S. Canby."

CONCLUSIONS OF LAW.

1. The order of President Lincoln of March 6, 1865, was not a license or permit which authorized Walker to purchase the cotton in question at Mobile at the time and under the circumstances set forth in the findings.

2. Said Walker acquired no title as against the United States to the cotton purchased by him of O'Grady.

3. The claimants have no cause of action, and their petition must be dismissed.

STATUTES, ETC.

The petitioners claim under the Captured and abandoned property Act of March 12, 1863, the provisions of which are too familiar for recital here. (12 Stats., 820.)

The petition was filed August 17, 1867. As the cotton was seized after June 30, 1865, had not this petition been pending in court when the act of May 18, 1872 (17 Stats., 134), was passed, jurisdiction of the claim would have been conferred upon the Secretary of the Treasury; but it came within the exception of pending suits in section 5. (*Ib.*)

The act of July 13, 1861, ch. 3, § 5 (12 Stats, 257), authorized the President, by proclamation, to declare the inhabitants of any State or parts of a State where insurgents acted, or claimed to act, under the authority of the State, in a state of insurrection against the United States:

"And thereupon all commercial intercourse by and between the same and citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful, so long as such condition of hostility shall continue; * * * *Provided, however*, That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest, and *such intercourse*, so far as by him licensed, *shall be conducted and carried on* ONLY *in pursuance of rules and regulations prescribed by the Secretary of the Treasury.*

"And the Secretary of the Treasury may appoint such officers at places where officers of the customs are not now authorized by law as may be needed to carry into effect such licenses, rules, and regulations; and officers of the customs and other officers shall receive for services under this section, and under said rules and regulations, such fees and compensation as are now allowed for similar service under other provisions of law." (12 Stats., 257; Treas. Comp. of Acts, &c., pp. 7 and 8.)

Tennessee, Alabama, and Mississippi were all declared to be in a state of insurrection by proclamation of August 16, 1861, "and that all commercial intercourse between the same, and the inhabitants thereof, * * * and the citizens of other States, and other parts of the United States, is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed." (12 Stats., 1262; Treas. Comp., 21 to 23.)

The territorial exception contained in this proclamation, at the point indicated by stars in the foregoing quotation, having been revoked by the proclamation of April 2, 1863, is omitted. Under the last-named proclamation, the only excepted places were West Virginia, New Orleans, Key West, Port Royal, and Beaufort. (13 Stats., 730, 731; Treas. Comp., 26, 27.)

Under this legislation, trade regulations were made by the Secretary of the Treasury, which were revised and the revision formally approved by the President September 11, 1863. This was rule

"VII. Commercial intercourse with localities beyond the line of military occupation by the United States forces is *strictly prohibited;* and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States." (See the Treasury pamphlet compilation of the acts and regulations upon this subject, before cited, page 65, bottom.)

Upon the 2d day of July, 1864, another act of Congress, relating in part to this subject of commercial intercourse, was approved by the President. Those provisions of it deemed pertinent to the present discussion are found in sections 4, 8, 9, 10, and 11, which read as follows:

"SEC. 4. That the prohibitions and provisions of the act approved July thirteen, eighteen hundred and sixty-one, and of the acts amendatory or supplementary thereto, shall apply to all commercial intercourse by and between persons residing or being within districts within the present or future lines of national military occupation in the States or parts of States declared in insurrection, whether with each other or with persons residing or being within districts declared in insurrection and not within those lines; and that all persons within the United States, not native or naturalized citizens thereof, shall be subject to the same prohibitions, in all commercial intercourse with inhabitants of States or parts of States declared in insurrection, as citizens of loyal States are subject to under the said act or acts.

"SEC. 8. That it shall be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in insurrection, at such places thereon as shall be designated by him, at such prices as shall be agreed on with the seller, not exceeding the market value thereof at the place of delivery, nor exceeding three-fourths of the market value thereof in the city of New York at the latest quotations known to the agent purchasing: *Provided*, That no part of the purchase money for any products so purchased shall be paid or agreed to be paid out of any other fund than that arising from property sold as captured or abandoned, or purchased and sold under the provisions of this act. All property so purchased shall be forwarded for sale at such place or places as shall be designated by the Secretary of the Treasury, and the moneys arising there-

from, after payment of the purchase money and the other expenses connected therewith, shall be paid into the Treasury of the United States; and the accounts of all moneys so received and paid shall be rendered to, and audited by, the proper accounting officers of the Treasury.

"SEC. 9. That so much of section five of the act of thirteenth of July, eighteen hundred and sixty-one, aforesaid, as authorizes the President, in his discretion, to license or permit commercial relations in any State or section the inhabitants of which are declared in a state of insurrection, is hereby repealed, except so far as may be necessary to authorize supplying the necessities of loyal persons residing in insurrectionary States within the lines of actual occupation by the military forces of the United States, as indicated by published order of the commanding general of the department or district so occupied; and, also, except so far as may be necessary to authorize persons residing within such lines to bring or send to market in the loyal States any products which they shall have produced with their own labor or the labor of freedmen or others employed and paid by them, pursuant to rules relating thereto, which may be established under proper authority. And no goods, wares, or merchandise shall be taken into a State declared in insurrection, or transported therein, except to and from such places, and to such monthly amounts, as shall have been previously agreed upon in writing by the commanding general of the department in which such places are situated, and an officer designated by the Secretary of the Treasury for that purpose.

"SEC. 10. That all officers and privates of the regular and volunteer forces of the United States, and all officers, sailors, and marines, in the naval service, are hereby prohibited from buying or selling, trading, or in any way dealing in the kind or description of property mentioned in this act, and the act to which this is in addition, whereby to receive or expect any profit, benefit, or advantage to himself, or any other person directly or indirectly connected with him. And it shall be the duty

of such officer, private, sailor, or marine, when such property shall come into his possession or custody, or within his control, to give notice thereof to some agent appointed by virtue of this act, and to turn the same over to such agent without delay. Any officer of the United States, civil, military, or naval, or any sutler, soldier, marine, or other person, who shall violate any provision of this act, or who shall take or cause to be taken into a State declared to be in insurrection, or to any other point, to be thence taken into such State, or who shall transport or sell, or otherwise dispose of therein, any goods, wares, or merchandise whatsoever, except in pursuance of license and authority of the President, as provided in said fifth section of the act of July thirteen, eighteen hundred and sixty-one, aforesaid, and any officer or other person aforesaid who shall make any false statement or representation upon which license and authority shall be granted for such transportation, sale, or other disposition, and any officer or other person aforesaid who shall, under any license or authority obtained, willfully and knowingly transport, sell, or otherwise dispose of any other goods, wares, or merchandise than such as are in good faith so licensed and authorized, or shall willfully and knowingly transport, sell, or dispose of the same, or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the Secretary of the Treasury concerning the same, or shall be guilty of any act of embezzlement, of willful misappropriation of public or private money or property, of keeping false accounts, or of willfully making any false returns, or of any other act amounting to a felony, shall be liable to indictment as for a misdemeanor, and fine not exceeding five thousand dollars, and to punishment in the penitentiary not exceeding three years, before any court, civil or military, competent to try the same. And it shall be the duty of the Secretary of the Treasury, from time to time, to institute such investigations as may be necessary to detect and prevent frauds and abuses in the trade and other transactions contemplated by this act or by the acts to

which this is supplementary. And the agents making such investigations shall have power to compel the attendance of witnesses, and make examinations on oath.

"SEC. 11. That the Secretary of the Treasury, with the approval of the President, shall make such rules and regulations as are necessary to secure the proper and economical execution of the provisions of this act, and shall defray all expenses of such execution from the proceeds of fees imposed by said rules and regulations, of sales of captured and abandoned property, and of sales hereinbefore authorized." (13 Stats., 376, 377, 378; Treas. Comp., 17 to 19.)

The Treasury regulations issued under this act and approved by the President July 30, 1864 (though afterwards called the series of July 29), declared:

"III. Commercial intercourse with localities beyond the lines of actual military occupation by the United States forces is *absolutely prohibited*, and no permit will be granted for the transportation of any property to any place under the control of insurgents." (Treas. Comp., 94.)

This corresponds with the before-cited Rule VII of September 11, 1863. On the 24th of September, 1864, additional regulations were issued under the act of July 2, 1864, for the appointment of agents to purchase *for the United States* products of States declared to be in insurrection at designated places, *of which Mobile certainly was not one.* (Treas. Comp., 139.) These agents were bonded officers, whose powers were strictly limited and duties defined, as to price to be paid, &c., &c. It was thus prescribed by Rule

"VII. The purchasing agent shall, to the extent of the funds at his command and in pursuance of his instructions from the Secretary of the Treasury as to price and terms of payment, purchase all products offered to

him, of the character or description which by such instructions he is authorized to purchase; but no liability of any character shall be authorized or assumed by any agent for or on account of government previous to the actual delivery of the products other than a stipulation, in the form hereinafter prescribed, to purchase products *owned or controlled by applicants*, at a price to be agreed upon at the place and date of delivery." (Treas. Comp., 139, bottom.)

The form of the certificate to be given by the agent to the owner is found at the top of page 142 of this pamphlet and is that used by the purchasing agent, Kellogg, in his negotiation with Walker, and printed upon page eleven of the record. (See *ante*, p. 4, bottom.) The use of this form was prescribed by Rule VIII, Treas. Comp., 140, top.

"By Rule VIII, whenever any person shall make application to the purchasing agent setting forth that he owns or controls such products, the agent is directed to give him a certificate that such application had been made, and request safe conduct for such applicant and the necessary transportation.

"On the same date the President issued his proclamation, reciting the act of Congress and the regulations of the Treasury Department, in which it is declared that all persons having in their possession such products, and all persons owning or controlling such products, are authorized to convey them to either of the designated places of purchase, and such products shall not be liable to detention, seizure, or forfeiture while *in transitu*. And it also declared that persons who have so sold and delivered products to agents, as provided by the regulations, and having a certificate thereof, may purchase at the place of sale, or in any other place in a loyal State, any articles not contraband of war nor prohibited by the War Department, to an amount not exceeding in

value one-third the aggregate value of the products so sold by him to the agent; and 'articles so purchased may be transported by the same route and to the same place from and by which the products sold and delivered reached the purchasing agent,' and such articles are to have safe conduct by military and naval officers to the said places and by the same route." (Snell *v.* Dwight, 120 Mass., 12.)

BRIEF.

I.

The President had no *power* to authorize Walker to make the purchase he did of this cotton, under then existing circumstances and legislation.

The outbreak of war was, of itself, a prohibition of commercial intercourse between persons under the domination of the respective belligerents, without any express declaration upon the subject. (U. S. *v.* Lane, 8 Wallace, 195, middle; U. S. *v.* Grossmayer, 9 Wallace, 74, closing sentence of first paragraph of the opinion, per Davis, J.; The Hoop, 1 C. Rob., 198; Kershaw *v.* Kelsey, 100 Mass., 562–3; Mitchell *v.* U. S., 21 Wallace, 351, bottom, per Swayne, J.; U. S. *v.* Lapene, 17 Wallace, 602, bottom.)

In Hamilton *v.* Dillin (21 Wallace, 87), this court said, per Bradley, J.:

"The war was a public one. The government in prosecuting it had at least all the rights which any belligerent power has when prosecuting a public war. *That war was itself a suspension of commercial intercourse* between the opposing sections of the country. No cotton or other merchandise could be lawfully purchased in the insurrectionary States and transported to the loyal States without the consent of *the government.* If such a course of dealing were to be permitted at all, it would necessarily be upon such conditions as the government chose to prescribe. *The war power vested in the government* implied all this, without any specific mention of it in the Constitution. In England this

power to remit the restrictions on commercial intercourse with a hostile nation is exercised by the Crown," (citing part of the following passage from the opinion of Lord Stowell:)

"'By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone THEREFORE who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interest of the state. It is for *the state alone*, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of *the state*. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of *the government charged with the care of the public safety?*'" (The Hoop., 1 C. Rob., 199, 200.)

After quoting the first two sentences found in the preceding extract, Mr. Justice Bradley proceeds: "Bynkershoek says, 'It is in all cases the act of the sovereign.' By the Constitution of the United States the power to declare

war is confided to Congress," and then suggests an inquiry whether or not the President, as Commander-in-Chief, could license partial intercourse "*in the absence of Congressional action.*" * * * "But, without pursuing this inquiry, and whatever view may be taken as to the precise boundary between legislative and executive powers in reference to the questions under consideration, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject. Our first inquiry, therefore, will be whether the action of the Executive was authorized, or, if not originally authorized, was confirmed by Congress." (21 Wallace, 87, 88.)

The right to relax the rigid rule of absolute non-intercourse rests with the sovereign, according to the foregoing citations and to all the authorities, *because* in him is vested the power of declaring peace or war. That is to say, it belongs wherever the war-making power resides, as incident thereto. In this country, sovereignty is in the people, who can only express the sovereign will through their representatives in Congress, where (as Mr. Justice Bradley notices, in the above-named case, 21 Wall., 87), the Constitution places the power of making war and peace.

Because it is there placed, Congress must have a voice in regulating the incidents of the war, especially as to those matters incidental to captures, as to which it is expressly empowered to prescribe rules.

"SEC. 1174. The power to declare war may be exercised by Congress, not only by authorizing general hostilities, in which case the general laws of war apply to our situation, or by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed." (2 Story on Const., 88, § 1174, citing

Talbot *v.* Seeman, 1 Cranch, 1, 28, and Bas *v.* Tingey, 4 Dallas, 37, and giving the war of 1812 as an instance of general war, and the course we pursued towards France in 1798 as one of qualified war.)

In short, Congress has a right to be heard upon the policy to be adopted in the conduct of the war it has declared.

The opinion in the before-cited case of Snell *v.* Dwight after mentioning the various acts, regulations, and proclamations to which we have also referred, proceeds:

"From this review of the laws and regulations in force in March, 1865, when this contract was made, it appears that *no officers of the government*, civil or military, had *authority* to give permits to trade beyond the lines of military occupation by the forces of the United States, or to give licenses to trade to citizens of the States not in rebellion. * * * The several permits, therefore, under which the plaintiffs contend the contract was lawfully executed were *unauthorized*, and had no effect to make the contract or enterprise to the Yazoo River lawful; nor could the contract have been executed under *any* permits then authorized to be issued." (120 Mass., 13, 14.)

It is to be observed that the permits thus characterized by the Massachusetts court purported to emanate from President Lincoln, and were apparently similar in terms to the one printed in this record. Indeed, some of them are called, on page 14, "the Topp permits," because issued to Robertson Topp, sought to be made a party to the present litigation.

In determining the contest over the Ouachita cotton (6 Wallace, 531, bottom) the opinion of this court, after noticing that nobody but the President could give a valid license, observes: "The law-making power, in its

wisdom and caution, confided this important authority, so liable to be abused, to the Chief Magistrate alone." Then he held and exercised it only because so confided, and to the precise extent to which it was conferred. Therefore, in United States *v.* Lane, at the place before indicated, the court say: "It being the rule, therefore, that business intercourse with the enemy is unlawful unless directly sanctioned, the inquiry arises whether there was *any law of Congress* in force at the time that sanctioned this transaction." (8 Wallace, 195, bottom.) The court, in that case, announced its conclusion that the act of July 2, 1864, and the regulations issued under it, did not authorize the licensing of trade within the military lines of the enemy. (8 Wallace, 185, 198; same determination in Maddox *v.* U. S., 15 Wallace, 58, 60.)

II.

Construed by the light of history, and in harmony with the events, legislation, and executive orders and proclamations of the times, it is evident that President Lincoln neither gave nor intended to give any license to do what this claimant's testator did; and that the language of the instrument, according to its true legal effect, does not purport to give any such authority.

The act of July 13, 1861, ch. 3, § 5 (12 Stats., 257, and *ante*, pp. 7, 8,) provided that "such intercourse, *so far as by him licensed*, shall be conducted and carried on ONLY in pursuance of rules and regulations prescribed by the Secretary of the Treasury." These rules, so prescribed, in conformity with the authorizing statute, themselves had the effect of law.

They also bore the Presidential approval. It cannot be supposed that he who approved intended to violate

them. As this court said in relation to the act for the procurement of cotton-seed by the Secretary of the Interior, "Presumption is that Congress did not intend to relax the existing restrictions upon commercial intercourse" (The Reform, 3 Wall., 633); so the presumption applies with far greater force to any language of the President *susceptible* of a construction in conformity with law. In the preceding page of the report of the case of the Reform it is said that all such intercourse was forbidden unless the President's license "conformed in all respects to the Treasury rules and regulations." (3 Wall., 632.) No one but the President could license (The Sea Lion, 5 Wall., 647,) and he *only* in conformity with prescribed rules.

It appears by Rule III of the series of July 29, 1864 (*ante*, p. 12, middle), substantially the same as Rule VII of the revised series promulgated September 11, 1863 (*ante*, p. 8, bottom), that "commercial intercourse with localities beyond the lines of actual occupation by the United States forces is absolutely prohibited," &c. Additional regulations under this act of July 2, 1864, ch. 225, § 8, were issued September 24, 1864, providing for the appointment of agents to purchase, for the United States, the products of the States declared to be in insurrection, *at certain designated places*, "to wit: New Orleans, Memphis, Nashville, Norfolk, Beaufort, N. C., Port Royal, and Pensacola" (Treas. Comp., 139), *all of which were within the Federal lines*, at certain prices and on the terms of payment set forth in these regulations. (*Ib.*) By Rule VII of this series (*Ib.*, at the bottom of the page) such agents were to assume no responsibility beyond the terms of a prescribed form of stipulation "to purchase products *owned or controlled by the*

applicants," at the time of making application. Upon the day of the promulgation of these rules, September 24, 1864, the President issued an executive order upon the same subject, directing safe conduct to be given to persons who had made contracts with such purchasing agents, &c. (Treas. Comp., 142–3.)

In the beforementioned case of Snell *v.* Dwight, the Massachusetts court present what we consider to be the construction of these rules and orders of September 24, 1864:

"The regulations and proclamation of September 24 do not conflict with the regulation of July 29, which prohibits trade with localities beyond the military lines of the United States (United States *v.* Lane, 8 Wall., 197), and declares that no permits shall be issued for the transportation of property to any place under the control of insurgents. The regulations are to be construed together, and the provision of July 29 is so far modified that purchases may be made through agents from persons residing in the insurrectionary States, and property may be transported thither if purchased with the proceeds of products sold to agents of the government, according to the statute, the regulations and proclamation made in pursuance thereof. The prohibition against trading with inhabitants of insurrectionary districts, at localities beyond the military lines of the United States, and transportation of property beyond those lines for the purposes of trade, continues in force to the same extent as provided under the statute of 1861." (120 Mass., 12, 13.)

The court there held a transaction similar to this one of Mr. Walker's to be illegal. (Snell *v.* Dwight, 120 Mass., 9 to 19.) It will be seen that this result was reached by independent reasoning, though the authority of this court, in the cases declaring licenses invalid

if purporting to authorize trade beyond the lines of our military occupation (United States *v.* Lane, 8 Wall., 185, and United States *v.* Maddox, 15 *ib.*, 58) is recognized and the cases cited.

The paper given by President Lincoln to Mr. Walker, rightly construed, is within the terms of the law, but the action of Mr. Walker was outside the authority given, and was illegal.

The law authorized agents to purchase *at designated points*, as before stated, cotton brought within our lines to those points. (U. S. *v.* Lane, 8 Wall., 198–99; U. S. *v.* Maddox, 15 *ib.*, 60.) Not all or any cotton, however; it must be cotton owned or actually controlled by the applicant at the time the stipulation between him and the Treasury purchasing agent was signed. (*Ib.*)

In the earlier case it was said, after citing the law and the regulations under it:

"There is nothing in the petition, or the findings of the court below, to show that Lane complied with these provisions. On the contrary, it is clear from his own statement that he neither owned nor controlled the cotton when he contracted to sell it, but that, after the contract was made, he procured it within the rebel lines. Neither the law nor the regulations through which it was administered were intended to protect a speculation of this sort. The purchasing agent had no authority to negotiate even with any one in relation to the purchase of Southern products, unless at the time of the negotiation he either owned or controlled them." (U. S. *v.* Lane, 8 Wall., 200, bottom; Maddox *v.* U. S., 15 *ib.*, 62.)

The document upon which Walker's executors rely, in its opening sentence, professed to issue and be based upon his claim that he then, March 6, 1865, owned certain products of the insurrectionary States and had exist-

ing arrangements for other such products, all of which he proposed to sell and deliver, &c. It is thereupon ordered that all such his products "which a purchasing-agent of the Government has [already] agreed to purchase and the said Walker *has* [heretofore] stipulated to deliver," &c., shall be free from seizure and detention.

As observed by the learned justice who delivered the opinion of the court below, this was not a license to trade, but a safe-conduct to take goods into either of the cities designated by law. The judge thus analyzes it:

"It begins by reciting that Walker claimed to own products in the insurrectionary States, and had arrangements with parties therein for other such products, and that he proposed to sell the same to agents of the United States authorized to purchase such products for the Government, and then it proceeds to set forth what the President does grant thereby. He *orders* that all such products which a purchasing-agent has agreed to purchase shall be free from seizure, detention, and forfeiture, and all officers of the Army and Navy and all civil officers of the Government are directed to observe this *order* and give said Walker, his agents, and means of transportation, and said products, free and unmolested passage through the lines, and safe conduct within the lines, while going for or returning with said products, and while said products are in store awaiting transportation. There are no words of license to trade in the document. It is a mere pass or order, cautiously limited to matters connected with the products which were owned or controlled by Walker, and granted to him nothing but for himself and his products 'safe conduct, unmolested passage, and freedom from seizure, detention, and forfeiture.' It was issued and is drawn up in language strictly with reference to the purchasing of products of insurrectionary States by the agents of the United States, and in aid of that object, and it conferred

no authority or benefit which Walker did not have without it under section 8 of the act of July 2, 1864 (13 Stat., 377), and the regulations of trade made by the Secretary of the Treasury, except as an order and passport from the commander-in-chief, granting to him 'free and unmolested passage through the lines and safe conduct within the lines while going for and returning with said products,' and exemption from seizure of himself and his products.

"It does not purport to give Walker a general license to purcase products, and cannot be so construed even if the President had the power to confer such a privilege upon him. And when the language is read in the light of the important fact that Congress had taken away from the President by statute the power previously conferred upon him of granting licenses to carry on commercial intercourse, it seems conclusive that this document was not intended to, and did not authorize commercial intercourse except as provided by the statutes, and that it only recognized Walker's right to sell to the United States agents the products which he owned or might control, and assured him protection and safe conduct for the same and for himself. As a passport and order for protection it was within the clear and unquestionable power of the commander-in-chief to grant, and was of great importance and might become of great value to Walker, who was an enemy, residing in hostile territory, occupied by the Union forces, claiming to own and control property within the lines of the enemy. To such a person so situated, the order allowing him 'free and unmolested passage through the lines and safe conduct within the lines,' and protection for himself and his products, conferred upon him an exceptional privilege which sufficiently indicates the object and scope of the document and renders it unnecessary to give to it any further effect in order to carry out the will of the President, thus distinctly expressed, and to that extent exercised within his legal and constitutional authority." (Record, 17.)

III.

"If, then, the claimant's testator was not licensed by the order of the President to make the purchase which they rely upon to prove his title to the cotton, was he prohibited by the non-intercourse acts from thus acquiring title to such property so situated as against the United States?

"As has been seen, the act of 1861 (12 Stat., 257) prohibited all commercial intercourse between citizens of States and parts of States declared in insurrection by the President's proclamation and the citizens of the rest of the United States. In July, 1861, the President issued his proclamation (12 Stat., 1262) declaring in insurrection the inhabitants of the States of Tennessee, Alabama, Mississippi, and other States, excepting such parts as 'may, from time to time, be occupied and controlled by forces of the United States engaged in the dispersion of said insurgents.' By proclamation of April 2, 1863 (13 Stat., 731), the President revoked that exception, saving only the ports of New Orleans, Key West, Port Royal, and Beaufort, and some counties of Virginia. This left the parts of insurrectionary States occupied and controlled by the Federal forces declared to be in rebellion as the rest of the States to which they belonged. Then followed the act of 1864, chapter 225 (13 Stat., 376), where by section 4 it was enacted as follows: 'The prohibition and provisions of the act approved July 13, 1861, and of the acts amendatory or supplementary thereto, shall apply to all commercial intercourse by and between persons residing or being within districts within the present or future line of national military occupation in the State or parts of States declared in insurrection, *whether with each other or with persons residing or being within districts declared in insurrection within those lines.*'

"It has been decided by the Supreme Court that a citizen of that part of an insurrectionary State held and controlled by the military forces of the United States could have commercial intercourse neither with the

citizens of the loyal States (Cutner's Case, 17 Wall., 517), nor with the citizens of disloyal States outside of the territory so occupied. (Ensley's Case, 9 C. Cls. R., 12.)

"The facts now before us present the case of a citizen of one place, occupied by the Union forces within an insurrectionary State, having commercial intercourse with a citizen of another place, held in like manner within another insurrectionary State, the two places being separated by intervening territory and under the command of different military officers, General Canby at Mobile, and General Thomas at Memphis, and the property purchased being mostly in still another insurrectionary State, and all within the rebel lines.

"At the time of his purchases Walker was a citizen of Memphis, which had been occupied by the Federal forces since June 6, 1862, within the State of Tennessee, which was declared to be in rebellion. O'Grady was a citizen and resident of Mobile, Ala., which was similarly situated. On the very day that Mobile surrendered to the national arms Walker appeared in that place, and concluded his purchase from O'Grady of the large quantity of 3,405 bales of cotton on plantations in Alabama and Mississippi. The purchase and sale of property between such persons so situated, and under such circumstances, would seem to be clearly prohibited by the fifth section of the act of July 13, 1861 (12 Stats., 257), as amended and affected by the act of July 2, 1864, chap. 225, §§ 4–9 (13 Stats., 376, 377), and so rendered void thereby as against the United States, according to the decisions of this court and of the Supreme Court heretofore rendered. Walker, being a citizen of Memphis, could gain no rights of general commercial intercourse with the citizens of Mobile by going there with the Army when that city surrendered, or by remaining if he were there before the surrender. His rights depended upon the place of his domicile. (Desmare's Case, 93 U. S. R., 605).

"It appears to have been the policy of the law to shut out from general commercial intercourse with everybody the inhabitants of sections of insurrectionary territory

occupied by the United States armies in the field; and the citizens of the different isolated sections so held did not, on account of being similarly situated, have a right to pass over intervening territory and trade with each other in places and States in which they did not reside. If they had possessed such right, they would have been privileged above all other citizens of both loyal and disloyal territory. The prohibition of commercial intercourse by citizens of the occupied places applied to trade, 'whether with each other or with persons residing or being within districts declared in insurrection within those lines.'

"The circumstances under which Walker made his purchase do not aid in rendering valid his title. It was consummated on the very day Mobile fell into Federal power; when the hostile armies were exhausted and severely pressed on all sides; when the Confederacy, as an armed power was crumbling to pieces, and the territory within which the cotton was stored was about to be surrendered, and in less than a month, on the 5th of May, 1865, was surrendered to the Union Army. The transaction was a purely speculative one, not authorized nor encouraged even under the statute and regulations for the purchase of the products of insurrectionary States, by the National Government through its authorized agents.

"The claimant's case is not altered by the fact that on the 1st of June, 1865, he entered into a written agreement with a Treasury agent to sell the cotton to the United States. If his title was not valid against the United States, the act of the purchasing-agent would not bind the Government to pay for what it had a better title to itself. He had no authority to waive any rights of the United States, and the proceedings authorized for the purpose of obtaining from the producers themselves the products of insurrectionary territory could not be used to cover a defective title, or aid speculative transaction, or deprive the United States of their legal rights of conquest.

"It has been said by the Supreme Court, 'Neither

was the law nor were the regulations through which it was administered designed to protect a speculation wherein the products contracted to be sold were to be procured by contractors within the rebel lines after the contract was made. Besides this, we decided that private citizens were prohibited from trading at all in the insurrectionary districts; that the object of the law and the regulations made to carry them into effect was to encourage the insurgents themselves to bring their products to us.' (Maddox *vs.* United States, 15 Wall., 62; United States *vs.* Lane, 8 Wall., 185.)

"It would be a clear evasion of the law to allow cotton purchased as this was by Walker to be sold to the United States through an agent appointed to encourage the insurgents themselves to bring in their own products for sale to the United States." (Record, 18, 19.)

IV.

In addition to the illegality of his own conduct, there was a vice attached to the cotton itself, through the aid by it rendered to the Confederacy, which prevented its being purchased by or on account of the United States.

"If we go behind the claimant Walker's purchase, we shall find the title of his vendor also tainted with a fatal defect, of which Walker had notice, and subject to which he bought the cotton. O'Grady, who sold to Walker, purchased directly of the Confederate States, through an agent of that *de facto* government, who was authorized and directed to make sale of this and other cotton, to raise money for the pressing needs of the armies in the field, and to meet its other obligations, and who received payment at a dollar a pound in Confederate notes. And this purchase was made at Mobile only five days before the rebels evacuated that city, and six days before it surrendered to the Union forces. The cotton was sold to aid the rebellion, by supplying the government with means to continue resistance to the national armies.

"By the decision in Sprott's Case such a purchase was void as against the United States. (Sprott *vs.* The United States, 20 Wall., 459.) That case and this cannot be distinguished in principle. Sprott was a citizen and resident of Mississippi, within the Confederate lines, and there purchased his cotton of an agent of the Confederate States, and paid for it in the currency of the United States. The only difference between the two cases is, that in Sprott's case payment was made in United States currency, and in this case it was made in Confederate notes. These notes were of value to the Confederacy at that time, and they constituted the only currency through which the rebel government conducted its domestic purchases, paid its officers and soldiers, and supported its armies in hostile resistance. To furnish that government with Confederate notes was aiding the rebellion as much as to furnish it with United States currency, the difference being only in the value of the money, and the difference in value was made up for by difference in quantity. In Sprott's Case the cotton sold for 10 cents a pound in United States currency, and in this case for $1 a pound in Confederate notes.

"If this purchase by O'Grady was void as against the United States, the purchase from him by Walker was equally void, for Walker knew the title of O'Grady, and took the same tainted with all its illegality and defects. He not only took a bill of sale of the cotton without recourse to O'Grady, but he received from him the thirty-seven original planters' certificates, receipts, and agreements, by which it appeared that the planters sold to the Confederacy, and agreed to take care of the cotton and deliver it to the order of the secretary of the rebel treasury, or his agents or their assigns, to each of which the rebel cotton agent attached a transfer under his hand and official title, with directions to the planters to deliver the cotton to O'Grady or his order, and accompanied by a license to export the same from the Confederate States. And these planters' certificates, receipts and agreements, by which it appeared that the planters sold to the Confederacy, and agreed to take care of the cotton

and deliver it to the order of the secretary of the rebel treasury, or his agents, or their assigns, to each of which the rebel cotton agent attached a transfer under his hand and official seal, with directions to the planters to deliver the cotton to O'Grady or his order, and accompanied by a license to export the same from the Confederate States.

"And these planters' certificates, with the rebel agents" transfer and license to export, were all indorsed by O'Grady and passed over to Walker at the time of purchase by him. They constituted more than notice to him of the illegality of the purchase by O'Grady as against the United States; they were the muniments of his title, and contained his authority to take possession of the cotton and remove it beyond the rebel lines, an authority granted by the Confederate Government, and resting upon that power alone for its validity. Without these certificates and orders and license, Walker would have no claim even to possession of the cotton while the Confederates held control of the territory, and he never did, in fact, obtain possession, because the rebel power was soon afterward forever broken and destroyed, and the officers of the United States, its conquerors, seized the cotton by right of conquest before Walker reached it to assert his title; and if to the Union military officers he had asserted title thereto, through the fallen power and the order of that hostile organization, it would have merited and rightly received no more respect than is given by the courts of the Union to the contracts and orders of the rebel government when their execution would be to the injury of the United States.

"Walker's title and right of possession, as against the United States, were trebly defective; first, in his own purchase in violation of the non-intercourse acts; second, in the illegal purchase by O'Grady from the enemies of the Union in hostile organization, of which he had notice; and, third, in being himself obliged to claim through transfers, orders, and licenses from that hostile organization.

"The transactions were throughout, in the language

of the Supreme Court, 'tainted with the vice of the rebellion,' and that vice, as against the United States, at least, destroys every contract, makes void every purchase, and bars every claim into which it enters." (Whitfield *vs.* The United States, 93 U. S. R., 170, 171.)

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